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1980

# In the Matter of the Estate of David E. Ross, Deceased : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate  
of DAVID E. ROSS,  
Deceased.

No. 16816

## BRIEF OF APPELLANTS

Appeal from the Judgment of the  
Third Judicial District Court, Salt Lake County  
Honorable David B. Dee

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E. RODERICK ROSS

FILED

MAY 27 1980

Clerk, Supreme Court, Utah

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of DAVID E. ROSS,	)	
Deceased.	)	No. 16816
	)	
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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate	)	
	)	
of DAVID E. ROSS,	)	No. 16816
	)	
Deceased.	)	
	)	
	)	

BRIEF OF APPELLANTS

NATURE OF THE CASE

This is a proceeding initiated by the personal representative of the decedent David E. Ross for a judicial determination as to whether certain shares of corporate stock owned by the decedent should be distributed as part of the estate, or whether such shares had been previously given to one of the heirs by the decedent prior to his death.

DISPOSITION IN LOWER COURT

On August 24, 1979, a full evidentiary hearing was held before the Honorable David E. Dee, at which time the claimant donee offered evidence in an attempt to prove that certain shares of stock passed to him by inter vivos gifts. A claim disputed by the remaining heirs. On October 19, 1979, the lower court issued its Memorandum Decision in favor of Earl Roderick Ross and held that an inter vivos gift of stock had been made prior to the decedent's death.

RELIEF SOUGHT ON APPEAL

Appellants David E. Ross II and Betsy Louise Ross Rapps (the only other heirs of the decedent) seek reversal of the trial court's judgment and an order of this Court that the

stock now in controversy should be included in the estate of the decedent to be divided equally among the three heirs.

#### STATEMENT OF FACTS

On November 9, 1979, the lower court executed its Findings of Fact and Conclusions of Law prepared by the attorney for Earl Roderick Ross. (R., pp. 110-121). Subsequently, appellants filed a "Motion to Alter and Amend the Decree, Findings of Fact and Conclusions of Law." (R., pp. 128-129). Appellants submitted "Amended Findings of Fact and Conclusions of Law" for the consideration of the Court. (R., pp. 146-155). The trial court denied the appellants' motion and ratified the previous Findings of Fact filed with the clerk. (R., pp. 144-145).

Appellants maintained in the lower court that the Findings entered by the lower court were erroneous in two respects. First, that certain legal conclusions were made in the "Findings of Fact" and second, that material facts were omitted from the Findings. (TR., pp. 453-464). The lower court rejected these arguments. (TR., pp. 465-466). In any event, however, a comparison of the proposed Findings submitted by appellants and the actual Findings filed with the clerk show minimal differences. While appellants contend that certain critical findings were omitted by the trial court, appellants have little dispute as to the actual Findings entered by the trial court and would agree, for purposes of this appeal, that the facts as found are basically undisputed.

Since the Argument portion of this brief will concern



itself with specific findings and conclusions of the trial court, there would be no purpose served in extensive repetition of the facts at this point. However, a brief overview of the facts should be helpful to this Court in understanding the position of the parties. References to the transcript will be omitted as to all undisputed facts and will only be included as to facts in dispute or as to facts omitted in the Findings of the trial court.

The decedent David E. Ross was the secretary and treasurer of Equitable Life Insurance Company for many years, and served as a director and stock transfer agent of the company. (Tr., p. 176). The respondent Earl Roderick Ross (hereinafter referred to as "Rod Ross") is a son of the decedent. Appellant David Ross II is also a son of the decedent and is the brother of Rod. Appellant Betsy Ross Rapps (hereinafter referred to as "Betsy Rapps") is a daughter of the decedent and is the sister of Rod and David.

The decedent was also secretary and treasurer and stock transfer agent of four other corporations known as Ross Brothers Corporation, Equitable Investment Company, Insurance Investment Company, and National Housing and Finance Company. (Tr., p. 177).

Appellant Betsy Rapps resides in Fairfax, Virginia, and has lived there for six years. (Tr., p. 373). Appellant David Ross II lives in St. Charles, Illinois (Tr., p. 313). Respondent Rod Ross previously lived in the eastern United States but returned to Salt Lake in 1972 and has lived here

since that time. (Tr., pp. 267-269).

In 1972 Rod Ross began working for Equitable Life Insurance Company and saw his father on an occasional basis at the company. Rod continued to work for the company and is presently the new secretary-treasurer. (Tr., p. 268).

It is basically undisputed that between 1974 and 1978 the decedent discussed with several persons his desire to reward Rod for his efforts in the company by giving him stock in addition to that which would be distributed to him under the decedent's will. (R., p. 117). The majority of these conversations adduced at trial concerned a future intent to give additional unnamed stock to Rod. (E.g. Tr., pp. 203, 218, 297-298, 301). In other conversations, the decedent purportedly mentioned specific gifts which he intended on making, or which he had already made. (Tr., pp. 206, 310).

Although the decedent's intent as expressed to several witnesses is basically undisputed as to his desire to reward Rod, it is equally undisputed that he was deeply concerned about the problems that would develop with his other children by the gift of any additional shares. (Tr., pp. 204, 207, 261). Even Rod Ross recognized this problem and said that he did not want to be a party to any decision giving him extra stock since it would only cause problems with Betsy and Dave. (Tr., p. 206).

Prior to May of 1977 the decedent maintained a safety deposit box at First Security Bank and kept all family stock certificates in that box. The decedent maintained the stock for the entire Ross family which included his own family,

the family of his brother Galen, and the family of his deceased brother Ray. Each family member had his or her own envelope in which various stock certificates were placed by the decedent. (Tr., pp. 179, 185).

In November of 1974 the decedent cancelled a stock certificate which he owned in Equitable Life and Casualty Insurance Company and issued a new certificate in the name of Earl Roderick Ross for 2,210.70 shares. He reissued a new certificate to himself for the surplus shares which were not given to Rod. A stock ledger sheet of Equitable was prepared by the decedent and reflected the issuance of shares to Rod and the cancellation of the decedent's shares. The certificate was placed in an envelope which had the name of Earl Roderick Ross written upon it and was dated November 29, 1974. The decedent placed the envelope in the First Security safety deposit box. None of the decedent's heirs had access to this box.

On December 2, 1974, a stock dividend was declared by Equitable Life and Casualty Company and an additional 552.67 shares were issued by the company to Earl Roderick Ross. The actual paper transaction was again accomplished by the decedent, who was secretary and treasurer of the corporation, and he again placed the new stock certificate in a second envelope noting the name of Earl Roderick Ross and dating it December 2, 1974. This envelope also was placed in the safe deposit box.

On November 30, 1976, and on May 3, 1977, two stock

dividends were paid directly by Equitable Life and Casualty to Earl Roderick Ross, each amount being \$276.33.

In May of 1977 the decedent's brother Ray died. At that time the decedent and his surviving brother Galen transferred the contents of the First Security safety deposit box to the company safe of Equitable Casualty. (Tr., pp. 178-179). This safe, which contained all of the family stock certificates, was located in a small room adjoining the decedent's office. Only the decedent, the president, and the vice-president of the company had the safe's combination.

Rod Ross attended stockholder meetings of Equitable Life Insurance Company and the other corporations managed by his father even before any purported gift of stock had been made to him. (Tr. 274). On December 5, 1977, an organizational meeting was held for Ross Brothers Corporation. The corporation was formed in order to distribute the assets of a former partnership owned by the three Ross brothers. At the meeting Galen Ross issued new stock certificates and handed them to each recipient. Rod was handed a certificate of 250 shares which represented 25 percent of his father's allotted shares. After examining the certificate Rod handed it to his father. The decedent subsequently placed it into the safe with the other family certificates.

In February of 1978 several stock transactions occurred in which stock certificates were issued in the name of Earl Roderick Ross for the Equitable Investment Company, the Insurance Investment Company, and the National Housing and

Finance Syndicate Corporation. These transactions are outlined in the Findings of the Court. (Tr., pp. 114-116). A separate stock ledger sheet was created on the records of the Insurance Investment Company under the name of Earl Roderick Ross but no ledger entries were made for the transfers as to the other two companies since ledger sheets were not maintained.

The certificates as to these three companies were placed in a single envelope with the name of Rod Ross and the certificate numbers written upon it. This envelope was then placed in the safe in the office of the decedent.

A will was prepared by the decedent's brother Galen on February 17, 1978, which divided the decedent's estate equally among the three surviving children. Mr. Ross, upon cross-examination, identified four exhibits which were in his handwriting and which noted the number of purported shares transferred by the decedent to Rod Ross as to each company. Mr. Ross stated that these were notes that the witness had made for provisions to be placed in the decedent's will but that these specific clauses were never actually put into the will. (Tr., pp. 265-266). Thus, the will made no mention of any prior gifts having been made to Rod.

It is also undisputed, although not contained in the Court's Findings, that no tax returns were ever filed by the decedent with respect to any of the alleged gifts (Tr., p. 240), that respondent Rod Ross had no access to either the safety deposit box or the safe, that after his father's death he was not aware where any of the certificates were located (Tr., p. 277), and that Rod did not see the envelopes



containing the stock until after his father's death.  
(Tr., p. 272).

Numerous other facts were raised at the hearing. These facts concerned the credibility of the witnesses, the sequence of events, the knowledge of the respondent as to the gifts, and the conversations among the parties regarding the gifts after the decedent's death.

The case was submitted to the trial court after extensive briefing by both parties. A Memorandum Decision was made by the lower court on October 19, 1979. The court concluded that a valid gift had been made by the decedent to Rod Ross prior to the decedent's death. A Judgment and Decree and accompanying Findings of Fact and Conclusions of Law were subsequently executed by the trial court. (R., p. 107-120).

It is from this judgment that the present appeal is taken. (R., p. 137).

#### ARGUMENT

EVEN ASSUMING THE FACTS AS FOUND BY THE LOWER COURT TO BE CORRECT, THE COURT ERRED AS A MATTER OF LAW BY MISAPPLYING THE LAW TO THESE FACTS AND CONCLUDING THAT A VALID GIFT HAD BEEN MADE.

Appellants David Ross II and Betsy Rapps maintain that the lower court committed prejudicial error in determining that a valid gift had been made of the various stock when the facts as found by the trial court failed to show that essential elements of a valid gift were present. Thus, appellants do not dispute the evidence supporting the court's findings, but do dispute the conclusions reached from these findings. This contention was expressed in Elton v. Utah State Retirement

Board, 503 P.2d 137 (Utah 1972) as follows:

A trial court's findings will not be disturbed unless clearly against the weight of evidence or unless it manifestly appears that the court has misapplied the law to the established facts. Id. at 138 (Emphasis added).

A review of the rules applicable to gift cases is necessary in order to understand the arguments now advanced by these appellants.

A. BURDEN OF PROOF

This Court has repeatedly held that one who claims title to property by inter vivos gift has the burden of proving all of the elements of such gifts by clear and convincing evidence. The law in Utah in this regard is consistent with the overwhelming weight of authority in other jurisdictions. This standard has been stated as follows:

There is no presumption in favor of a gift inter vivos. One who asserts title by gift inter vivos has the burden of proving that a gift was made, including the existence of all of the elements essential to its validity. . . . Courts watch gifts inter vivos with caution, especially where, as here, their enforcement would result in an inequitable distribution of decedent's property. Jones v. Cook, 223 P.2d 423, 425 (Utah 1950).

The standard of proof required in gift cases is higher than the normal civil case. Rather than the "preponderance of evidence" test, courts require that the evidence must be "clear and convincing." As stated by this Court:

We are quite in accord with the proposition of law advocated by the plaintiff: That the initial burden as to the prima facie proof of a gift, and also the burden of ultimate persuasion in the case, rests upon the defendant as to the claiming donee. We further agree with the general rule that one so claiming a gift from another must

so demonstrate by clear and convincing evidence; and this is especially so when the claimed donor is deceased. Sims v. George, 446 P.2d 831, 833 (Utah 1970).  
(Emphasis added).

The standard of "clear and convincing" proof has likewise been defined by this Court as follows:

For a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. A mind which was of the opinion that it was convinced and yet which entertained, not a slight, but a reasonable doubt as to the correctness of its conclusion, would seem to be in a state of confusion. Greener v. Greener, 212 P.2d 194, 205 (Utah 1949).

Similarly, this Court in Lovett v. Continental Bank and Trust Company, 286 P.2d 1065 (Utah 1955), stated that clear and convincing proof approaches that degree of proof required in a criminal case viz, "beyond a reasonable doubt."

The reason for requiring this high standard of proof is obvious. Once a person has died there is no way for the decedent to refute the claims of the living that gifts were made prior to death. Unless a high standard of proof is maintained the estate of a decedent could be virtually wiped out by claims of inter vivos gifts. This principle was again stated by this Court when it said:

While it is the duty of courts to enforce the intention of the owner, it is also their duty to protect his estate against all claims unless established in conformity to law. Holman v. Deseret Savings Bank, 124 P. 765, 768 (Utah 1912).



As will be seen from the following discussion, the trial court failed to apply this standard to the facts of this case.

B. ELEMENTS OF AN INTER VIVOS GIFT.

In order for a person to successfully claim title to property by inter vivos gift, he must first prove by clear and convincing evidence each of the following elements:

(1) A clear and unmistakable intention on the part of the donor to pass immediate ownership. Jones v. Cook, 223 P.2d 423 (Utah 1950); Lovett v. Continental Bank and Trust Company, 286 P.2d 1065 (Utah 1955).

(2) An irrevocable delivery. Wiggill v. Cheney, 597 P.2d 1351 (Utah 1979); Lovett v. Continental Bank and Trust Company, 286 P.2d 1066 (Utah 1955); Losee v. Jones, 235 P.2d 132 (Utah 1951).

(3) Acceptance. Simms v. George, 446 P.2d 831 (Utah 1970).

Appellants disputed each of these necessary elements in the lower court. Evidence was presented, for example, that while the decedent often expressed an intention to give Rod additional stock, this intention was phrased in terms of the future and that the decedent hesitated in actually completing the gift because of the disharmony which would occur to the family unit once the gift was made. Likewise, appellants disputed the acceptance of the gift by Rod on the basis that he was completely unaware of what stock had been given to him, if

any, and was as curious to see the purported gift as were the other heirs.

Of course, Rod Ross put on evidence contrary to that of appellants and the trial court chose to believe his version of the evidence regarding intent and acceptance. Upon review of this record appellants have concluded that this Court could find substantial evidence to support the lower court's conclusion of intent and acceptance, and therefore do not appeal from these findings.

The element of "irrevocable delivery," however, does require reversal. As will be shown infra, even if it is assumed that the trial court believed all of the facts in support of delivery as produced by Rod Ross at the trial, this evidence is insufficient as a matter of law to justify a finding of irrevocable delivery.

#### C. FINDINGS OF THE LOWER COURT REGARDING DELIVERY.

After hearing evidence presented by both parties the Court issued its own Memorandum Decision on October 19, 1979. This decision, together with the Findings subsequently entered, show the basis for the Court's judgment that delivery had been performed. The Memorandum Decision stated, in part, the following:

The Court finds that there was a clear and unmistakable intention on the part of the deceased to pass immediate ownership to E. Roderick Ross and that there was an irrevocable delivery to him and an acceptance by him of the stock certificates here in question.

In arriving at this decision the Court is cognizant of the part played by stock record books which, in this case, clearly

indicated a transfer on these books and records to E. Roderick Ross and an actual issuance of certificates requiring the signature of both the deceased and Galen Ross to effectuate the intent of the donor. Had the certificates in fact not been placed in an envelope in a safe or desk drawer of David E. Ross, which seemed to be his custom in regards to all certificates of stock, but in fact the certificate became lost, then the only source of information as to ownership would have been the corporate stock transfer records and by entry on these records a clear and unmistakable contention for immediate ownership transfer is recorded. These records also indicate an irrevocable delivery and an acceptance . . . The stock record books give a basis for determination of voting power, dividend recipients, and persons to whom corporate information such as proxy, notice of meetings, etc., must be furnished and are the most clear and convincing evidence as to the actual owners of a corporation. (R., p. 106).

On November 9, 1979, the lower court executed its Findings of Fact and Conclusions of Law. Viewing these Findings most favorably to Respondent Rod Ross with reference to the requirement of irrevocable delivery reveals the following:

(a) A November 1974 transaction in which Rod Ross received 2,210.7 shares of Equitable Life and Casualty common stock was received in the stock ledger book of the company by the decedent. (R., p. 112).

(b) A stock dividend of 552 shares of Equitable Life and Casualty was distributed in the name of Earl Roderick Ross.

(c) The respondent received two cash dividends in the amount of \$276.33 on May 3, 1977, and November 30, 1976.

(d) On December 5, 1977, a certificate for 250 shares of Ross Brothers stock was physically handed to Respondent by his uncle Galen Ross. Respondent then handed this certificate to his father, David E. Ross.

(e) On February 17, 1978, additional stock was issued to Respondent in Equitable Investment Company, Insurance Investment Company, and National Housing and Finance Syndicate Corporation. All of these transfers were recorded on the books and records of the respective corporations and, in addition, a separate stock ledger sheet was created in the Insurance Investment Company under the name of Respondent Rod Ross.

(f) All of the preceding certificates were placed in envelopes with the name of Respondent Earl Roderick Ross upon them and with notations made by the decedent as to the various certificate numbers and number of shares.

(g) These stock certificates were kept along with all family stock certificates, both owned and not owned by the decedent, and were kept in either the First Security safety deposit box or the safe of Equitable Life Insurance Company. (R., pp. 110-119).

The trial court enumerated the basis for its conclusion of law that a delivery of the certificates had taken place by stating the following:

[O]n each of the gifts, there was clear and convincing evidence of a voluntary transfer of possession sufficient to show delivery of each of the certificates, such delivery being demonstrated by:

(a) A complete transfer on the books and records of the corporation for each of the shares in question; and

(b) By the placing of each of the shares in a properly identified envelope to be kept with and maintained with the certificates belonging to each of the members of the Ross family; and

(c) The complete lack of any effort by the decedent to revoke, to set conditions on or otherwise exercise any prerequisite of ownership in any of the shares in question. (R., pp. 119-120).

As will be seen infra, these findings made by the lower court and the reasoning used by the court in its Memorandum Decision are contrary to Utah law and therefore the conclusions and judgment are erroneous.

D. PURPOSE OF REQUIRING ACTUAL DELIVERY OF STOCK.

The requirement of actual irrevocable delivery is not a mere formality with no substance. The obvious purpose of this requirement is to insure that a person who purportedly gives away property for either altruistic or tax reasons has actually done so and that the gift is not a sham for the purpose of giving the donor an advantage without suffering any detriment. The policy reasons behind this requirement have been stated in the following article relating to the Uniform Stock Transfer Act which was formerly law of Utah. This article states the following:

The Uniform Stock Transfer Act which is statutory . . . required delivery of a properly endorsed certificate, either in blank or to a specified person, this is clear and simple. Nevertheless, many alleged gifts of corporate stock have been held invalid by the courts because there was no delivery or no endorsement in compliance with the express provisions of the Act. Often, this is the result of negligence, but more frequently is brought about by various altruistic plans of the donor or by "hedging" on the unequivocal requisites of the Act. The donor thinks it is easy to give stock away, and also retain dominion over it at the same time.

An attorney advises his client of the advantages of a direct transfer to the beneficiaries through the medium of a gift inter vivos and the client agrees; but still he hesitates to give up the stock irrevocably. He therefore employs a variety of hedging arrangements. He may endorse the certificate in blank and place it in a safety deposit box to which he and the donee have

access, or he may have a new certificate issued in the donee's name and keep it in his own desk. His intention, in either case, is to retain dominion over the shares until his death or some indefinite future time. He is actually attempting to make a conditional gift inter vivos but there is no such thing. L. Modesitt, "Application of the Uniform Stock Transfer Act to Gifts of Stock," 20 Rocky Mountain L. Rev. 67 (Emphasis added).

In the instant case it is only conjecture whether the decedent wished to transfer all of these shares of stock to Rod at the time the certificates were placed into the safe or whether, because of fear of family disunity or speculation that Rod would leave the company, the decedent wished to retain control over the stock until such time as he felt actual delivery to be appropriate.

Even assuming, arguendo, that the decedent actually intended on transferring the stock at the time the certificates were made, this intention is not sufficient without delivery. As stated by this Court in Singleton v. Kelly, 212 P. 63, 66 (Utah 1922):

While it is true that the courts will carry out the grantor's intention whenever this is possible, without any evidence of delivery it can be of no importance whatever what the intentions of the grantor in this case were. One may have an intention to convey his property to another, but unless the deed is delivered to the grantee or someone for him, title cannot pass, and the undelivered deed is a nullity.

Thus, appellants contend as their sole issue that the evidence as found by the trial court most favorably to Respondent Rod Ross does not support the conclusion that a valid delivery of the stock actually occurred. The following sections deal



with the question of what is required in making the gift of corporate stock.

E. DIVERGENT REQUIREMENTS FOR TRANSFER OF STOCK.

The determination of whether a gift of stock is complete or not rests upon whether an irrevocable transfer of the stock has been deemed to have occurred. The purpose of the delivery requirement is to eliminate the donor's dominion and control over the stock.

There is a split of authority among the various states as to what steps must be taken before the transfer is complete. A small minority of states hold that as soon as a transfer has been recorded on the books of the corporation that the control of the stock is lost by the donor and the gift has become irrevocable regardless of whether the donor keeps the stock certificate in his possession. The vast majority of states, including Utah, accept a contrary view to the effect that transferring stock on corporate books does not take the stock beyond the donor's control unless the stock certificate is physically delivered to the donee.

The Supreme Court of Tennessee in Figures v. Sherrell, 178 S.W. 2d 629 (Tenn. 1944) extensively discusses these differing philosophies adopted by the various states. The court noted that Pennsylvania, Illinois and Vermont had adopted the rule that the corporate records govern whether or not a transfer has occurred. These courts maintain that the best evidence of ownership is the transfer on the books of the company. These courts hold that stock certificates are

secondary evidence of ownership only and that they are nothing more than the official declaration by the company of what had already appeared on the books.

The Tennessee court then stated that this Pennsylvania rule was not that of Tennessee and that title to shares of stock, both legal and equitable, follow the lawful possession of the certificate. The court quoted with approval a prior Tennessee case which stated its stock transfer rule as follows:

The title of the purchaser upon the assignment of the certificate was complete without registration or transfer on the stock books of the corporation. The rule requiring transfer on the books of the company, by the well-settled line of decisions in this state, and by the great weight of authority in the courts of America, is a rule made solely for the benefit of the company. By it the company is enabled to know who are entitled to vote, and to whom it may pay dividends. Id. at 631.

The Tennessee Supreme Court after extensively reviewing its prior decisions concluded as follows:

It is clear, therefore, from our decisions that as between the parties thereto the completion of a sale or a gift cannot be made to depend upon entries on the books of a corporation where its shares of stock are involved. Title in this jurisdiction goes with the certificate. Id. at 632. (Emphasis added).

As will be discussed in the next subsection, Utah has adopted this same philosophy that title goes with the certificate and not with the corporate books. The basis of this doctrine was discussed by the New Jersey Court in Besson v. Stevens, 120 A. 640 (N.J. 1921), where a gift of corporate stock was denied in the case where the donor had a certificate of stock reissued in the name of his daughter on the corporate books but failed



to deliver the new certificate to his daughter during his lifetime. The court rejected the argument that a valid gift had been made and stated the following:

Suppose the testator, after receiving the new certificate from the company, had changed his mind and decided that he wanted the stock for himself; that Elsie had demanded the certificate from him and he had refused to give it to her. There is no doubt in my mind that Elsie's claim of ownership, in whatever court or by whatever form of action asserted, would not be sustained. Id. at 646.

The great weight of authority supports the Utah position that title does not pass with the mere change of ownership reflected on corporate books. A leading authority on corporations and trust agreements substantiates this position by saying:

The mere direction by the owner to the corporation to change the corporate records regarding ownership, followed by such change to the name of another, seems to be inadequate proof of a gift, when not followed by delivery of the new certificate. The change of the corporate transfer books is not ordinarily necessary to a completed gift or conclusive evidence that a donation has occurred. 1 A Boggert, Trust and Trustees, §142, page 13.

There are numerous states supporting this position, including Kentucky, Weisenberger v. Corcoran, 121 S.W. 2d 712 (Ky. 1938); Maine, Reid v. Cromwell, 183 A. 758 (Me. 1936); North Carolina, Buffalo v. Barnes, 38 S.E. 222 (N.C. 1946); New York, In Re Schenk's Will, 140 N.Y.S. 2d 802 (N.Y.S.C. 1965); Oklahoma, Frazier v. Oklahoma Gas and E. Company, 63 P.2d 11 (Okla. 1936); Texas, Baldwin v. Fleck, 168 S.W.2d 904 (Tex. Civ. App. 1943); and Washington, In Re McCoy's Estate, 63 P.2d 522 (Wash. 1937).

The Supreme Court of Minnesota in In Re Bush's Trust, 81 N.W. 2d 615 (Minn. 1957), succinctly stated the reasons why these states (and Utah) required title to pass with the certificate and not with the corporate books. The court there stated:

In view of the basic importance of the certificates as a badge of ownership and as a symbol of transfer of title between the parties, and further in view of the fact that the recording of a transfer of stocks on the corporate books by the great weight of authority is (in the absence of an express statute to the contrary), for the benefit of the corporation, we reject the authorities which hold that a bare transfer of the stock on the corporate records, without a delivery to the transferee of the new certificate, passes the legal and equitable title to the stock. Id. at 623 (Emphasis added).

Thus, the overwhelming majority of states require an actual transfer and delivery of the stock certificate itself before a gift is deemed to have occurred. Utah is numbered among the majority of states which have adopted this requirement.

#### F. UTAH LAW OF STOCK TRANSFER

Since the formation of Utah as a state it has always been the rule that stock transfers through the certificate and not through entries in corporate books. This historical development can be briefly traced by examining several Utah Supreme Court decisions, the prior Uniform Stock Transfer Act, and the present Uniform Commercial Code provisions.

In 1912 this Court in Rasmussen v. Sevier Valley Canal Company, 121 P. 741 (Utah 1912) held that a stockholder may transfer his equitable title to shares of corporate stock by delivery of the certificate without complying with the by-laws

of the corporation for transferring shares even though the certificate provides that the shares are transferable only on the surrender of the certificate and the by-laws of the corporation provide that no transfer of stock shall be valid except when entered on the corporate books.

This Court in Brown v. Wright, 161 P. 448 (Utah 1916), noted that the Utah laws of 1907 provided that stock would be deemed personal property and that the delivery of the stock certificate creates the actual transfer of the title regardless of any corporate by-laws or requirements to the contrary. Finally, this Court in Gowans v. Rock Port Irrigation Company, 293 P. 4 (Utah 1930) stated that as between parties, the delivery of the stock certificate is sufficient to transfer title to the purchaser.

In 1927 Utah adopted the Uniform Stock Transfer Act as subsequently found in Section 16-3-1, U.C.A. (1953). This Act provided that title to a stock certificate and to the shares represented thereby could only be transferred "by delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby." The comments written by the Commissioners who drafted the Uniform Stock Transfer Act stated the purpose of the Act as follows,

The provisions of this Section are in accordance with the existing law, except that the transfer of the certificate is here made to operate as a transfer of the shares, whereas at common law it is the registry on the books of the company which makes the complete transfer. The reason for the change

is in order that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage. 6 Uniform Laws Annotated, page 2. (Emphasis added).

Numerous state courts have held that under the Uniform Stock Transfer Act it is only the transfer of the certificate itself which constitutes the delivery for purposes of determining gifts. See Shinsaku Negano v. McGrath, 187 F.2d 753 (7th Cir. 1951); Fonentot v. Drewniak, 181 So. 619 (L.A. App. 1938); In Re Bush's Trust, 81 N.W.2d 615 (Minn. 1957); and Figures v. Sherrell, 178 S.W.2d 629 (Tenn. 1944)1

In 1965 the Uniform Stock Transfer Act was repealed and replaced with the Uniform Commercial Code, Investment Securities Act, §70A-8-101, et seq.

Section 70A-8-309 retains the requirement of actual delivery of the certificate to pass title. This section states:

An endorsement of a security whether special or in blank does not constitute a transfer until delivery of the security on which it appears or if the endorsement is on a separate document until delivery of both the document and the security.

The Commissioners of the Uniform Commercial Code made the following comment as to Section 8-309:

There must be a voluntary parting with control in order to affect a valid transfer of an investment security as between the parties.

One court has interpreted this provision to hold that even if it was the intention of the president of a company to give certain shares to his children, the mere endorsement on the certificates and transfer in the corporate books were insufficient to constitute a gift when the shares were never

delivered before the president's death. Whitfield v. Metropolitan Life Insurance Company, 262 F.Supp. 977 (D. Ark., 1967).

The preceding review of Utah judicial and statutory law clearly shows that transfer of stocks can only be accomplished by delivery of the stock certificates and that any entries made in the corporate books are deemed to be for the benefit of the corporation only and do not constitute a transfer as between the transferor and the transferee.

With these principles in mind, it only remains to again examine the decision of the lower court in light of the correct principles of law which should have been applied.

Ġ. FINDINGS OF THE COURT REGARDING DELIVERY COMPARED TO PROPER APPLICABLE LAW.

As previously noted, the trial court in its Memorandum Decision found delivery of stock had occurred because an actual transfer of the stock had been made on the corporate books. The court stated that had the certificates of stock become lost then the only source of information as to ownership would have been the corporate stock transfer records and "by entry on these records a clear and unmistakable intention for immediate ownership transfer is recorded." The court also stated, "The stock record books give a basis for determination of voting power, dividend recipients, and persons to whom corporate information such as proxy, notice of meetings, etc., must be furnished and are the most clear and convincing evidence as to the actual owners of a corporation." (R., p. 106).

The transfer of corporate records mentioned in the Memorandum Decision was also listed as one of the three reasons justifying the conclusion of delivery in the court's Conclusions of Law. (R., pp. 119-120). The reliance by the trial court on the transfer of corporate records is clearly erroneous. As can be seen supra, the overwhelming weight of authority in the United States and in Utah requires actual delivery of the stock certificate and not the mere change of ownership in the corporate books.

In the instant case, this reason is even more compelling since the decedent himself was the stock transfer agent of each of the corporations and could have easily changed the corporate books to reflect his change of mind in giving Rod any of the stock in the various companies.

The trial court was even mistaken as to the effect that a lost stock certificate may have in determining ownership. When a stock certificate is lost and there is a dispute as to ownership, the claimant must not only show that the original certificate has been stolen or lost but also must show that he is the rightful owner of the stock as determined by the rules relating to stock ownership. 18 C.J.S., Corporations, Section 266, page 738. Therefore, it would still be required under Utah law for respondent to prove that actual delivery of the certificate had occurred before he could obtain a replacement for a lost or stolen certificate. Contrary to the trial court's assertion, the corporate books do not establish this ownership.

In addition to the transfer on the corporate books and



records, the court relied on two other factors in determining a delivery had been made. First, "by the placing of each of the shares in a properly identified envelope to be kept with and maintained with the certificates belonging to each of the members of the Ross family;" and second, "the complete lack of any effort by the decedent to revoke, to set conditions on or otherwise exercise any prerequisite of ownership of any of the shares in question" (R., pp. 119-120). These reasons also fail to justify a finding of delivery.

While it is no doubt true that the decedent was the custodian of the stock certificates for the entire family, this fact does not assist the Respondent in attempting to show a valid delivery. A donor cannot deliver property to himself and then claim that he is a constructive trustee as he could if the property were delivered to a third party in which an irrevocable delivery could be determined.

It is undisputed that Respondent Rod Ross had no access to either the First Security safety deposit box or the company safe. On the other hand, the decedent had access to both and could put in or take out documents at his pleasure. Had a valid delivery been made to Respondent he could no doubt choose to place the certificates along with the other family certificates in the custody of the decedent. However, since no delivery was ever made to Respondent in which he gained complete control over the certificates and in which the decedent gave up complete dominion over the certificates, the presence of the other family stock certificates in the safe is of no assistance to Respondent's contentions.

Finally, the fact that the decedent had not yet revoked or set any conditions of ownership does not constitute delivery. The question is not whether the decedent revoked the power of ownership but whether he had the ability to revoke such power. Obviously, if he had such ability no "irrevocable" delivery had been made.

The fact that the Respondent received a cash dividend is also not germane since the decedent could choose to allow Respondent to have the income from the stock without giving him the actual ownership. Likewise, the fact of a stock dividend is also immaterial since the stock was never delivered to the Respondent but was kept by the decedent with the other stock. Cash dividends and stock dividends in themselves do not constitute proof of delivery. In Re Bush's Trust, 81 N.W. 2d 615 (Minn. 1957).

In this case the parties are the children of the decedent. A gift to family members is especially suspect and a strict enforcement of the rules requiring delivery is required and the donor must go as far as the nature of the property and the circumstances reasonably permit in parting with dominion and making the gift irrevocable in cases involving family members. In Re Brown's Estate, 206 P.2d 816 (Mont. 1948).

To avoid these types of disputes actual manual delivery of the property should be accomplished when delivery is physically possible. Will v. Commissioner of Internal Revenue, 82 F.2d 561 (5th Cir. 1940). Here, Respondent Rod Ross admitted that he saw his father on a daily basis and that it would have been



an easy thing for his father to give him the certificates and to make actual delivery. (Tr., p. 274).

The trial court clearly erred in concluding that a valid delivery of the stock had occurred. Without delivery there can be no gift and it was the burden of Respondent to show by clear and convincing evidence that such a delivery had in fact occurred. This case is analogous to this Court's recent decision of Wiggill v. Cheney, 597 P.2d 1351 (Utah 1979), in which the Court sustained a finding that no valid gift had occurred because of the failure to deliver a deed to real property. This Court concluded by stating:

The evidence presented in the present case establishes Lillian Cheney remained in sole possession and control of the deed in question until her death. Because no actual delivery of the deed occurred prior to the death of the grantor, the subsequent manual delivery of the deed by plaintiff to defendant conveyed no title to the property described therein, or any part thereof, or any of its contents. Id. at 1352.

The same situation exists in the present case and the stock purportedly transferred to Respondent Rod Ross should be deemed, as a matter of law, a part of the entire estate to be divided equally among the three heirs in accordance with the terms of the will.

#### CONCLUSION

Before Rod Ross can prevail in his claim as to the stock now in dispute, it is necessary for him to prove all elements required for a valid inter vivos transfer.

The evidence as found by the trial court and viewed mostly favorably to Rod clearly shows that the decedent failed

to deliver the stock prior to his death. The trial court's conclusion to the contrary is directly against Utah law of stock transfer and cannot be sustained.

Because of the failure of Respondent to prove by clear and convincing evidence the delivery of the stock, this Court must reverse the judgment of the lower court and order that the disputed stock be included in the decedent's estate.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellants to Kenneth W. Yeates, attorney for Respondent E. Roderick Ross, at 141 East First South, Salt Lake City, Utah, on this 27 day of May, 1980.

Loray Cook